

No. 45010-1-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

**PACIFIC RESOURCE DEVELOPMENT, INC. et. al,
APPELLANTS,**

v.

**UNION BANK, N.A., successor-in-interest to the FDIC as
Receiver for Frontier Bank,
RESPONDENT.**

APPELLANTS' OPENING BRIEF

BUDSBERG LAW GROUP, PLLC
Brian L. Budsberg, WSBA #11225
Benjamin J. Riley, WSBA #34949
Attorneys for Appellants
1115 West Bay Drive, Suite 302
Olympia, WA 98502

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INTRODUCTION

Pacific Resource Development, Inc., RTB, Inc., Richard T. Brunaugh and Amanda Brunaugh, Donald C. Linkem and Elizabeth A. Linkem, David A. Parker and Velma L. Parker, Paul E. Wilson and Kelly I. Wilson (hereinafter collectively, “Appellants”) submit this brief.

This case raises the exact same issue as at least six other cases pending before the Court of Appeals in this state: Can a bank which non-judicially forecloses on a deed of trust that secures both a debt and guarantees of that debt later obtain a deficiency judgment on the guarantees?¹ Appellants are

¹ The following appeals raise issues substantially identical to the issues raised in this case:

County	Case Name	Cause No.	Trial court held non-judicial DOT foreclosure barred suit on guarantee?	Court of Appeals Cause No.	Oral Argument
Pierce	First Citizens v. Allison	10-2-13379-3	N	43619-1-II	9/12/2013
Snohomish	Wash. Fed. v. Harvey	12-2-02123-4	Y	69791-9-I	Not set yet
Skagit	Wash. Fed. v. Gentry	12-2-00608-6	Y	70004-9-I	Not set yet
King	Union Bank v. Vanderveer	12-2-14844-9	Y	70327-7-I	Not set yet
Pierce	Union Bank v. Brinkman	12-2-06973-1	N	44839-4-II	Not set yet
King	Union Bank v. F.R. McAbee, Inc. et al	12-2-2590-2	Y	70497-4-I	Not set yet

asking this Court to overturn the ruling of the trial court that found Appellants liable for deficiencies, based on personal guarantees, after the nonjudicial foreclosure of property by Union Bank. Appellants are also asking that this Court overturn the ruling of the trial denying Appellants' motion for summary judgment, and this Court dismiss Union Bank's claim in its entirety.

ASSIGNMENT OF ERROR

Appellants challenge the trial court's order granting summary judgment. CP 388-392. The trial court held that there were no issues of fact and that as a matter of law Appellants were liable for the deficiencies based on the personal guarantees they entered into in this matter. Appellants challenge trial Court's ruling on the basis that the ruling is not supported by the record. The ruling does not correctly articulate the correct legal standard. It does not support the conclusion that Union Bank was able to seek a deficiency judgment against the Appellants under RCW 61.24.100 after a nonjudicial foreclosure was completed.

ISSUES PRESENTED ON APPEAL

A. *Issue-* Is the Deed of Trust secured by the Guarantees signed by the Appellants? *Answer-* Yes the Deed of Trust clearly

references guarantees signed by the Appellants as related documents that are secured by the Deed of Trust.

B. *Issue-* Does RCW 61.24.100(1) permit Union Bank to bring an action for any deficiencies against the Appellants on their individual guarantees after Union Bank has conducted a nonjudicial foreclosure? ***Answer-*** No, Union Bank cannot seek a deficiency from the Appellants because RCW 61.24.100(1) does not permit such an action after a nonjudicial foreclosure.

C. *Issue-* Can bank impose a waiver of the statutory rights and remedies under RCW 61.24.100 or any other statute under the Deed of Trust Act? ***Answer-*** No, Union Bank cannot impose a waiver of statutory rights under the Deed of Trust Act because the statute does not allow for such a waiver.

STATEMENT OF THE CASE

I. Facts

On or about September 15, 2005 Frontier Bank loaned Limerick Investors, LLC \$10,000,000 (Loan No. ending in 9084). CP 397. Subsequently, the loan was extended and the principal balance increased several times through Limerick's execution of change in terms agreements so that by the time Loan No. ending in 9084R matured on May 15, 2009,

the principal balance was \$11,485,500. CP 397-398. Appellants executed undated Commercial Guaranties without reference to any loan, on which the bank is relying to assert its deficiency claims. CP 398. The deed of trust associated with the loan was recorded on September 21, 2005 and references Parcel E of Boundary Line Adjustment No. 9703100192 under the Pierce County Auditor's file No. 200509210429. CP 398. The deed of trust was modified on March 15, 2007 to increase the indebtedness to \$11,400,000 and was recorded on March 23, 2007 under Auditor's file No. 200703230943. CP 398. On April 30, 2010 Union Bank acquired Frontier Bank from the FDIC Receiver. CP 398.

The Deed of Trust specifically states:

“THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS AND THIS DEED OF TRUST.” CP 131.

The Deed of Trust further states:

“The words ‘Related Documents’ means all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, and all other instruments, agreements and documents,

whether now or hereafter existing, executed in connection with the Indebtedness; provided that environmental indemnity agreements are not 'Related Documents' and are not secured by this Deed of Trust. CP 136.

The Deed of Trust further contains a "PAYMENT AND PERFORMANCE" section of the Deed of Trust states that "Grantor shall pay to lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantors obligations under the Note, this Deed of Trust, and the Related Documents." CP 131.

The Commercial Guaranties contain the same definition of Related Documents (except for the exclusion of environmental indemnity agreements) and further provide: "Guarantor also waives any and all rights or defenses based on suretyship or the impairment of collateral including, but not limited to, any rights or defenses arising by reason of [...] any 'anti-deficiency law'" CP 145, 149, 153, 157, 161, 165, 169, 173, 177, and 181.

On July 29, 2011 Union Bank non-judicially foreclosed on this Deed of Trust and sold the property comprising Parcel E of Boundary Line Adjustment No. 9703100192 in Pierce County, WA at a Trustee's sale. CP 399.

Plaintiff filed a Complaint on July 25, 2012 which brought claims against Appellants for breach of contract for non-payment of the deficiency after the sale for no less than **\$9,732,815.06**, plus interest and other charges accruing after July 25, 2012. CP 399. Plaintiff's first cause

of action was for “Breach of Contract (Suit on the Guaranties)” and the language of this complaint, in part, is the following:

“4.2 Appellants’ non-payment of Borrower LFN’s indebtedness under the Note respectively constitute breaches and defaults under the terms of the Guaranties between Appellants and Frontier Bank.....

4.13 Union Bank is entitled to a money judgment against Appellants Pacific Resource, RT, Richard T. Brunaugh, Amanda Brunaugh, Donald C. Linkem, Elizabeth A. Likem, David A. Parker, Velma L. Parker, Paul E. Wilson, and Kelly I. Wilson, jointly and severally, for breach of the Guaranties for non-payment of the deficiency after the Sale for no less than **\$9,732,518.06**, plus interest and other charges accruing after July 29, 2011, the date of Sale.” CP 8-9.

Plaintiff’s second cause of action was for “Monies Due on Deficiency After Trustee’s Sale” and the language of this action is as follows:

“Pursuant to the terms of the Loan Documents, and any other related loan documents, and under WASH. REV. CODE § 61.24.100 *et seq.*, or other applicable law, the Appellants are each liable, jointly and severally, to Union Bank for all amounts due and owing above the sale price of the Property at the Sale, plus all fees, interest, costs of collection, and attorneys’ fees and costs.” CP 9-10.

On May 17, 2013, this Court found in favor of Plaintiff on summary judgment that Appellants are liable for the deficiencies alleged in Plaintiff’s complaint. CP 400. This court also denied Appellants motion for summary judgment asking for dismissal of Plaintiff’s complaint. CP 400.

ARGUMENT

I. Standard of Review

Union Bank had the burden of proving to the trial court that there was no dispute as to the facts surrounding its claim against the Appellants and that Union Bank was entitled to judgment as a matter of law. Union Bank had the burden of showing that a deficiency could be sought against the Appellants, pursuant to RCW 61.24.100, after a non-judicial foreclosure occurred. Additionally, Union Bank had the burden of showing that Appellants validly and legally waived their defense to enforcement of guarantees under 61.24.100. Union Bank was required to establish that, based on the all of the agreements entered into by Appellants and Union Bank, as a matter of law Union Bank was entitled to deficiency judgments against Appellants.

This Court must determine if summary judgment was properly granted in this case by engaging in a review. Summary judgment is properly granted when the pleadings, affidavit, depositions and admissions presented with respect to the motion demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Lauritzen v. Lauritzen, 74 Wn.App.432, 437, 874 P.2d 861 (Div. 2, 1994) citing Kessinger v. Logan, 113 Wn.2d 320, 325, 779 P.2d 263 (1989).

The burden is on the moving party to demonstrate that there is no genuine issue of material fact. Iwai v. State of Washington, 129 Wn.2d 84, 95, 915 P.2d 1089 (1996) (citing Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). The burden then shifts to the responding party to set forth specific facts which show there is a genuine issue for trial. Iwai, 129 Wn.2d at 95-96; Marquis v. City of Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). The Court must consider all of the facts in the record and all reasonable inferences therefrom in favor of the non-moving party. Phillips v. King County, 136 Wn.2d 946, 956, 968 P.2d 871 (1998). In order to create an issue of fact, the evidence presented by the non-moving party must be admissible. CR 56(e); Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980).

This Court reviews the trial court's summary judgment determination de novo. Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 492, 501, 115 P.3d 262 (2005). The trial court's decision to grant summary judgment in favor of Union Bank, holding that Appellants are liable for deficiencies after Union Bank completed its foreclosure is reviewed by this Court for abuse of discretion. Radach v. Gunderson, 39 Wn.App. 392, 399, 695 P.2d 128 (Div. 2, 1985). Similarly, the trial court's decision to deny Appellants' motion for summary judgment to dismiss Union Bank's claim is also reviewed for abuse of

discretion. Id. Moreover, a court necessarily abuses its discretion where it bases its ruling “on an erroneous view of the law.” Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

I. Deed of Trust Act set forth Foreclosure Parameters

In 1965, the Washington Legislature enacted the Washington Deed of Trust Act, codified at RCW 61.24 *et seq.*, to provide parties the option of non-judicial foreclosure. The Deed of Trust Act provided significant benefits to lenders. It simplified the foreclosure process. It permitted foreclosure without judicial oversight. It allowed creditors to obtain clear title to property much more quickly.

However, the Deed of Trust Act’s simplification of the foreclosure process also came with a benefit for debtors and drawback for creditors. In a judicial foreclosure, when the sale of the secured property generates funds insufficient to pay, a debt in full, the creditor may sue for the remainder of the debt (known as the “deficiency”). But, as a general rule and as discussed below, creditors foreclosing non-judicially may *not* sue for a deficiency.² This trade-off is the “*quid pro quo*” between borrowers and lenders that is the hallmark of The Washington Deed of Trust Act.³

² RCW 61.24.100(1).

³ Thompson v. Smith, 58 Wn. App. 361, 365-66, 793 P.2d 449 (1990).

II. The 1998 Amendments to the Deed of Trust Act Allowed Some Suits for Deficiency, but still prohibit deficiencies secured by a non-judicially foreclosed on deed of trust.

In 1998, the Legislature amended the Deed of Trust Act to provide some exceptions to the general rule that deficiency actions are not allowed in non-judicial foreclosures.

In its current form, the Act starts with the basic rule that deficiency actions after non-judicial foreclosure are forbidden: “Except to the extent permitted in this section for deeds of trust securing commercial loans, *a deficiency judgment shall **not** be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee’s sale under that deed of trust.*”⁴ The statute goes on to provide that for commercial loans, guarantors *may* in limited instances be subject to deficiency judgments:⁵

This chapter does not preclude any one or more of the following after a trustee’s sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

The statute goes on to provide that a guarantor may grant *its own* deed of trust to secure its guarantee, but that a deficiency actions on that

⁴ RCW 61.24.100(1) (emphasis added).

⁵ RCW 61.24.100(3) (emphasis added).

guarantor-granted deed of trust are limited to any decrease in the fair value of the property caused by waste or the wrongful retention of rents, insurance proceeds or condemnation awards.⁶

Finally, and most critically for this case, the statute says that a creditor may sue a guarantor for deficiency *if the guarantee was **not** secured by the deed of trust that was the subject of the non-judicial foreclosure.*⁷

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.

Any ambiguity in the operation of the Washington Deed of Trust Act "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers interests and the lack of judicial oversight in conducting non-judicial foreclosure sales."

Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 105 at ¶ 13, 297 P.3d 677 (2013).

III. The Deed of Trust secured Appellants' guarantee.

The trial court in this matter improperly held that the Guarantees signed by Appellants were not secured by the Deed of Trust that was foreclosed by Union Bank. Union Bank waived its right to seek a deficiency in this matter because it non-judicially foreclosed its obligation

⁶ RCW 61.24.100(6), which references RCW 61.24.100(3)(a)(i).

⁷ RCW 61.24.100(10).

and the Deed of Trust secured payment under the commercial guarantees.

RCW 61.24.100(1) reads as follows:

“(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust.” RCW 61.24.100.
Emphasis added

RCW 61.24.100(3) clarifies when there may be exceptions that allow credit to pursue guaranties:

“(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(a)(i) To the extent the fair value of the property sold at the trustee's sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale, an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

(ii) This subsection (3)(a) does not apply to any property that is occupied by the borrower as its principal residence as of the date of the trustee's sale;

(b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed; or

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.” Id.

Finally, RCW 61.24.100(10) states when a party is specifically allowed to pursue a guarantor for deficiencies on an obligation after a non-judicial foreclosure:

“(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.” Id.

Applied to the facts of this case, Appellants' obligations under their commercial guarantees were included in the definition of "Related Documents" and were thus included by the Bank as obligations securing the Deed of Trust and thus any deficiency was waived. The Court ruled that during the hearing on summary judgment there was an option for pursuing guarantors after a non-judicial foreclosure under RCW 61.24.100 and therefore Appellants must be liable on their guarantees. Appellants are not disputing there is an ability to pursue guarantors on obligations that were not included as secured by an obligation. Appellants' guarantees are secured by the Deed of the Trust that was non-judicially foreclosed on by the Union Bank. In this matter, the language of the Deed of Trust specifically states that the Deed of Trust was given to "SECURE" payment of the "INDEBTEDNESS" on the "RELATED DOCUMENTS". The "Indebtedness" was defined as the obligation of Limerick Investors, LLC to Frontier Bank. "Related Documents" was defined as "all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the indebtedness; provided, that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust." CP 136. The

commercial guarantees signed by the Appellants were executed at the same time as the Deed of Trust, Promissory Note, and Corporate Resolution in this case. The guarantees are related documents and these guarantees were “secured” by the Deed of Trust. Plaintiff chose to non-judicially foreclose on its Deed of Trust obligation with Limerick Investors, LLC. Therefore, pursuant to RCW 61.24.100, because Plaintiff non-judicially foreclosed on its obligation and the commercial guarantees signed by the Appellants were secured by the Deed of Trust, Plaintiff could not seek deficiencies against Appellants.

IV. Nonjudicial foreclosure in this matter eliminated Union Bank’s ability to seek a deficiency against Appellants.

Union Bank does not have any legal grounds for seeking a deficiency against Appellants because Plaintiff foreclosed on its obligation non-judicially. The Deed of Trust Act, specifically 61.24.100 prevents a party who has non-judicially foreclosed on a deed of trust from seeking a deficiency against guarantors. Thompson v. Smith, 58 Wn. App. 361, 366, 793 P.2d 449 (Div. 1, 1990) citing, Cox v. Helenius, 103 Wash.2d 383, 387, 693 P.2d 683 (1985). The court in Thompson held that a foreclosure, as set out in RCW 61.24.100, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair

value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation. Id.

Similarly, the ability for creditor to elect a remedy is a “quid pro quo” election which allows for the bank to benefit from a streamline process but must forgo other remedies such as deficiencies after non-judicial foreclosure sales. Donovick v. Seattle First-Nat. Bank, 111 Wash.2d 413, 416, 757 P.2d 1378 (1988). The court in Donovick held that there is a trade off for both debtors and creditors under the Deed of Trust Act:

“Reading the entirety of RCW 61.24 in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that there was contemplated a quid pro quo between lenders and borrowers. The borrower, for example, relinquished his right of redemption. *See* RCW 61.24.050 (“After sale, as in this chapter provided, no person shall have any right by statute or otherwise to redeem from the deed of trust or from the sale.”) The secured party, on the other hand, gave up any right to a deficiency judgment. *See* RCW 61.24.100.” Id.

Additionally, the wording of the Deed of Trust Act is plain and unambiguous and the Court must give effect to the meaning of this act. Albice v. Premier Mort. Svcs of Wash, Inc., 157 Wn.App. 912, 923, 239 P.3d 1148 (Div. 2, 2010) citing Udall v. T.D. Escrow Serv., Inc., 159 Wash.2d 903, 909, 154 P.3d 882 (2007); Enterprise Leasing, Inc. v. City

of Tacoma, 139 Wash.2d 546, 552, 988 P.2d 961 (1999); Cox v. Helenius, 103 Wash.2d 383, 387, 693 P.2d 683 (1985); Am. Cont'l Ins. Co. v. Steen, 151 Wash.2d 512, 518, 91 P.3d 864 (2004).

Applied to the facts in this matter, on July 29, 2011 Union Bank conducted a non-judicial foreclosure of its Deed of Trust. RCW 61.24.100(1) specifically states “a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust”. This language unambiguously precludes a creditor from seeking a deficiency after non-judicial foreclosure under a trustee sale. The trial court in this matter awarded Union Bank deficiencies on guarantees signed by the Appellants that Union Bank alleges were given in connection with the obligation secured by the foreclosed deed of trust. Union Bank conducted a non-judicial foreclosure and received the benefit of not having to bring a court action against Limerick Investors, LLC to complete a foreclosure. Because Union Bank elected to pursue a non-judicial foreclosure of the obligation of on the Deed Trust in this matter and guarantees of the Appellants were secured by that Deed of Trust, Union Bank has waived its ability to seek a deficiency, pursuant to RCW 61.24.100(1). This Court should reverse the decision of the trial court in

granting Union Bank's motion for summary judgment and dismiss Union Bank's claim against Appellants for a deficiency.

V. Union Bank cannot impose a waiver of Appellants' legal rights under RCW 61.24.100 or the remainder of the Deed of Trust Act.

Appellants are not able to waive statutory rights or agree to modify the statute because the statutory language does not allow for such a waiver. Union Bank is not allowed to impose a modification of the language of Deed of Trust Act and thus could not require that Appellants waive their rights under the statute. Schroeder, 177 Wn.2d 105, at ¶ 13, 297 P.3d 677. In Schroeder, a bank attempted to non-judicially foreclose on an agricultural mortgage obligation because the mortgage document allowed for a nonjudicial foreclosure of agricultural land. *Id.* The court in Schroeder held that a party could not agree to non-judicially foreclose on agricultural land because the Deed of Trust Act did not allow for non-judicial foreclosure of agricultural land. *Id.* emphasis added. The Court in Schroeder further ruled that the statutory requirement that agricultural land be foreclosed judicially, rather than non-judicially, in the Deed of Trust Act could not be waived by parties to deed of trust, where Act was not a rights-or-privileges-creating statute. *Id.* Instead, the Deed of Trust Act set up a list of requisites to a trustee's sale, and there was no indication that

the legislature intended to allow parties to vary these procedures by contract. Id.

Similarly, the Washington State Supreme Court has ruled that it will not allow for modification of statutory rights once parties have availed themselves to a statute. Bain v. Metro Mortgage Group, 175 Wn.2d 83, 108, 285 P.3d 34 (2012). The court in Bain examined the modification and waiver of statutory rights in a contract for the assignment of obligations between creditors under the Deed of Trust Act. Id. The court found the Deed of Trust Act analogous to the Arbitration Act where, when the parties avail themselves to the protection of the Act then the statutory rights under that act cannot be waived. Id. citing Godfrey v. Hartford Ins. Cas. Co., 142 Wash.2d 885, 16 P.3d 617 (2001).

Along the same lines, the Washington state Supreme Court has ruled previously, under other statutes, parties are not allowed to waive statutory rights if waiver is against public policy. Shoreline Community College v. Employment Security Department, 120 Wn.2d 394, 410, 842 P.2d 928 (1992). The court in Shoreline ruled that in the context of the collective bargaining agreement, parties could not waive rights under a

contract that were granted to them under the statute if such rights were put in place for public policy purposes. Id.⁸

Applied to facts of this case, Appellants signed unconditional guarantees of the Deed of Trust and Promissory Notes that secured these obligations. All of the documents in this matter were drafted by Union Bank. The guarantees purported to waive any statutory rights that the Appellants had in this matter. Union Bank then non-judicially foreclosed the Deed of Trust in this case. Union Bank then sought to pursue Appellants for deficiencies under the guarantees. There is no provision in RCW 61.24.100 or the remainder of the Deed of Trust Act that allows for the Appellants to waive their rights in the statute. Similarly, there are no provisions in the Deed of Trust Act that allow for Union Bank to impose a waiver of Appellants' statutory rights. The Washington State supreme Court has articulated a quid pro quo standard and public policy in which a creditor, such as Union Bank, can receive a stream-lined process the foreclose on a Deed of Trust, without being required to file a court case but the trade off is that no deficiency can be sought after this non-judicial foreclosure against guarantors of this obligation. RCW 61.24.100(1)

⁸ As noted earlier, the public policy of the Deed of Trust Act, specifically as it pertains to non-judicial foreclosures, is a quid pro quo meaning that the election to foreclose non-judicially is remedy that does not require a case filing or court case but the trade off is that no deficiency can be sought. Donovick v. Seattle First-Nat. Bank, 111 Wash.2d 413, 416, 757 P.2d 1378 (1988).

codifies this quid pro quo policy. Therefore, because the Deed of Trust Act does not allow for the imposition or agreement to waive Appellants rights and Union Bank elected its remedy of non-judicial foreclosure, this Court should overturn the trial court decision to grant summary judgment in favor of Union Bank and rule that Union Bank's claim against the Appellants should be dismissed.

VI. Trial Court's Decision must be reversed because of lack of legal grounds

The trial court in this matter did not have grounds for granting summary judgment because Union Bank could not prevail as a matter of law. Lauritzen, 74 Wn.App.432, 437, 874 P.2d 861 (Div. 2, 1994). Union Bank did not have legal grounds to obtain deficiencies against Appellants after non-judicially foreclosing on the Property at issue in this matter. The trial court should have ruled that the Union Bank waived its rights to seek to a deficiency after it conducted a nonjudicial foreclosure and that Union Bank could not require Appellants to waive their statutory rights.

REQUESTS FOR ATTORNEYS' FEES

Pursuant to RAP 18.1(b), the terms of the Guaranty and RCW 4.84.330, Appellants request that they be awarded their attorneys' fees incurred defending this lawsuit and prosecuting this appeal. The

Commercial Guaranty upon which Union Bank sued provides for payment of attorney's fees as follows:

Attorneys' Fees, Expenses. Guarantor agrees to pay upon demand all of the Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expense include Lender's attorneys fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals and any anticipated post-judgment collection services. Guarantor shall also pay all court costs, and such additional fees as directed by the court.

RCW 4.84.330 provides that unilateral attorney fee provisions such as the above are to be construed to give reciprocal rights to all parties to the contract. Additionally, RCW 4.84.330 requires that attorneys' fees should be awarded to the prevailing party. The contractual and statutory right of the prevailing party is absolute.

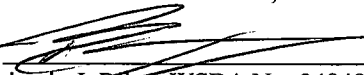
If this Court rules that Union Bank's election to conduct a non-judicial foreclosure on the Deed of Trust discharges any obligation that Appellants have under their personal guarantees, then Appellants are

entitled to attorneys and costs as the prevailing party. This Court should hold that Appellants are entitled to recover all reasonable attorneys fees in this action and, upon submission of a proper fee petition and costs bill, award Appellants the fees incurred in this appeal. This Court should remand this matter to trial court for a determination of the amount of reasonable attorneys' fees and costs incurred before the superior court.

CONCLUSION

Union Bank brought an action for deficiencies against Appellants in this matter, without any legal basis. Union Bank drafted the documents that are the basis for this case, decided not to proceed judicially with a foreclosure, then, after non-judicially foreclosing on the property at issue, brought an action against Appellants for a deficiency based on guarantees signed the Appellants. Because the guarantees of the Appellants secured the deed of trust that was non-judicially foreclosed on by Union Bank, Union Bank waived its right to seek a deficiency against Appellants. The Court should reverse the trial court's decision to grant summary judgment and dismiss Union Bank's claim against Appellants.

Dated this 13th day of September, 2013
Respectfully submitted,
BUDSBERG LAW GROUP, PLLC

By 
Benjamin J. Riley, WSBA No. 34949
Brian L. Budsberg, WSBA No. 11225
Attorneys for Appellants

WASHINGTON STATE COURT OF APPEALS
DIVISION II

UNION BANK, N.A., successor-in-interest to
the FDIC as Receiver for Frontier Bank,

Respondent,

v.

PACIFIC RESOURCE DEVELOPMENT,
INC. et. al,

Appellants.

No. 45010-1-II

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on September 13, 2013, I caused to be served in the manner indicated a true and accurate copy of the following:

1. Appellants' Opening Brief

in Case No. 45010-1-II upon the following via first class mail, facsimile and email:

Matthew Turetsky
Schwabe, Williamson & Wyatt
1420 5th Ave, Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
mturetsky@schwabe.com
JHicok@schwabe.com

Averil Rothrock
Schwabe, Williamson & Wyatt
1420 5th Ave, Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
arothrock@schwabe.com
mawilliams@schwabe.com

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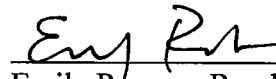
DECLARATION OF SERVICE

1

BRIAN L. BUDSBERG, PLLC
P.O. Box 1489
Olympia, Washington 98507
360-584-9093

//

Milton A. Reimers
Schwabe, Williamson & Wyatt
1420 5th Ave, Ste 3400
Seattle, WA 98101
Fax: 206-292-0460
mreimers@schwabe.com
rrebusit@schwabe.com
mescuriex@schwabe.com


Emily Penoyar Rambo

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Court of Appeals Case Number: 45010-1

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